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LIABILITY FOR INJURIES ARISING FROM THE USE OF DANGEROUS SUBSTANCES SOLD IN OPEN MARKET.

The case of *Cunningham v. The C. R. Pease House Furnishing Co.*, 69 Atl. Rep. 120, is interesting and based upon sound principles. In the principal case there was a common law count for negligence and a trial and verdict. The plaintiff's evidence tended to prove that the manufacturers of a stove blacking advertised in Nashua, stating that it was for sale by the defendants. The plaintiff's mother saw the advertisement, called at the defendants' store and asked the clerk if the blacking they were advertising was intended for stoves or for stovepipes. He replied that, "it was for stoves" and that, "the warmer the stove the better it works." She replied, "won't that be fine, I can black my stove without letting my fire go out." Relying upon the representation that the blacking could be safely used on a hot stove, the mother bought a can. Two days later the plaintiff, a member of the mother's family, used some of the blacking on a hot stove, and an explosion resulted, causing the injuries complained of. The plaintiff and her mother were blamelessly ignorant of the fact that the blacking contained naphtha.

The court likened the defendant's position to that of "one who puts destructive*** materials in situations where they are likely to produce mischief." 50 N. H. 420, 432, 9 Am. Rep. 267. Such a person must respond in damages to those who are injured because of his acts, if either he knew or ought to have known that the materials were dangerous and the person injured might come in contact with them." *Hobbs v. Company*, 74 N. H. 116; *Scott v. Shepard*, 3 Wills, 403; *Cooley, Torts*, 78.

"Although the defendants probably did not have the plaintiff in mind when they sold the blacking to the mother, they knew that the mother had bought it to use on her

stove and that other members of the family were likely to use it. Consequently the plaintiff can recover if the mother could have recovered had she been injured instead of the plaintiff. The defendants will not be prejudiced by the assumption that the plaintiff cannot recover if the mother could not and by the omission to consider whether the situation might not be such that a recovery might be had against both the mother and the defendants. *Ricker v. Freeman*, 50 N. H. 432, 9 Am. Rep. 267. The case is therefore considered as though it were an action by the mother."

"The court further says the common law imposes upon the seller the duty to refrain from falsely representing material facts for the purpose of misleading the buyer. The seller may praise the good qualities of his wares as much as he pleases and is not bound to disclose their defects to the purchaser, even if he knows of them and is aware that the buyer believes that he is purchasing sound goods. But if for the purpose of inducing the prospective buyer to change his position, the seller sees fit to make any representation, either express or implied, in respect to facts which are material to the subject matter of the sale, he must tell the truth." 74 N. H. 57, and cases cited in the opinion.

"The defendants admit their liability for an intentionally false statement of fact, but contend that they are not liable for a false statement honestly believed to be true, though negligently made," citing *Derry v. Peek*, 14 App. Cases, 337; *Angus v. Clifford* (1891), Ch. 449, 470. But the court shows that such is not the law in New Hampshire and cites with *Shackett v. Bickford*, *supra*, a number of other cases to the effect that "a person who acts upon a false representation, made for the purpose of inducing him to change his position, may recover the damages he sustains in an action of deceit, when the maker of the statement knew it to be false and in an action of negligence when he ought to have known it to be so," and concludes that, "If the defendant's false representation that it was safe to use the blacking on a hot stove was the cause of the plaintiff's injury, the fact

that they thought the statement true and had no intention to deceive do not necessarily bar her right to recovery. * * * If the representation was deceitful she could recover by showing that their fault contributed to cause her injury; but if it was merely negligence, she must show that it was the sole cause of her injury. 14 Harv. Law Rev. 188. The reason for this is that the law makes it the duty of everyone to use ordinary care to avoid being injured by another's negligence; but it imposes the duty on no one to use such care to avoid being injured by another's intentional wrong. In actions for negligence contributory negligence is a defense; in actions for intentional injuries it is not. * * * So in this case, if the defendants, for the purpose of inducing the plaintiff to buy the blacking, told her it could be safely used on a hot stove, and they neither knew nor cared whether their statement was true or false, they would be liable. If they had no thought of deceiving her, it would not be enough to show that they made the representation. She must then go further and show that the ordinary man would not have made it. 14 Harv. Law Rev. 188. The test, therefore, to determine whether the defendants were in fault for making the representation, is to inquire whether the ordinary man, having no more knowledge of the situation and its dangers than the defendants are shown to have had, would have told the plaintiff it was safe to use the blacking on a hot stove. It cannot be said as a matter of law that the ordinary man would have made such a representation unless it is common knowledge that the average man who engages in trade is accustomed to tell his patrons, not what he believes to be the truth in respect to his goods, but what he thinks would induce him to buy. * * * It is not common knowledge that the ordinary man is accustomed to make such representations to induce customers to buy his goods; and it cannot be said as a matter of law that an ordinary man selling a new blacking would affirm that he knew it would do all, and more than all, its makers claimed for it, when, in fact, he knew nothing of its qualities, and had done nothing to in-

form himself as to the soundness of the maker's claims."

The court held that the plaintiff was entitled to go to the jury on the common law count. This is an interesting case and we have no doubt of the soundness of the reasoning. See in this connection, *Scott v. Shepard*, 3 Wils. 403, in *Hughes on Procedure*, Vol. 2, L. 1172 and the notes thereto. "One who sets a dangerous thing in motion is presumed to intend the natural, direct and probable consequences of his act," is one of the greatest principles of the law. See also fine article on the subject, 14 Harvard Law Review, 188.

NOTES OF IMPORTANT DECISIONS

MUNICIPAL CORPORATIONS—APPROVAL OF PLAN FOR BUILDING BY BUILDING DEPARTMENT—COLLAPSE OF BUILDING DUE TO DEFECTIVE PLANS—LIABILITY OF MUNICIPALITY.—That a city is not liable to a person injured by the collapse of a building in course of erection, though the city building department approved defective plans, is held in *Stubley v. Allison Realty Co.* (N. Y.), 108 N. Y. Supp. 759. The court said in passing on the question raised by the pleading and evidence:

"It is somewhat difficult to determine from the allegations of the complaint whether the cause of action attempted to be alleged against the city is for negligence or nuisance; but inasmuch as it was contended upon the oral argument of the appeal by plaintiff's counsel, and the same contention is made in the brief presented by him, that it is for a nuisance, I shall, in disposing of the question presented, assume that to be the cause of action alleged. At the trial no proof was offered that the plans and specifications of the building as approved by the building department were defective, or, if so, to such an extent that the construction of the building itself would necessarily result in a nuisance, either public or private. The plans and specifications were not put in evidence, and if they had been, and it had appeared therefrom, or from other evidence, that they were defective, the action of the building department or the officers connected therewith in approving the same would not have rendered the city liable. The building department is not an administrative department of the city. It is a bureau created by statute to perform a public service, in which the city itself has no private interest, and from which it derives no special benefit or advantage in its corporate

capacity, and for any neglect, either of omission or commission on the part of the officers connected with such bureau, the city is not liable. Citing *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; *Fire Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. Rep. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *McGuinness v. Allison Realty Co.*, 46 Misc. Rep. 8, 93 N. Y. Supp. 267, affirmed 111 App. Div. 926, 97 N. Y. Supp. 1141; *Connors v. Mayor*, 11 Hun, 439.

But it is contended that the building, by reason of the defective materials used and the methods adopted in construction, was a public nuisance, because it was a menace to persons using the public street upon which it abutted; that this fact was or should have been known to the city, and, since it was obligated to keep the streets in a reasonably safe condition for public travel, it became liable to any person who sustained injuries from the collapse of the building, even though such person was not at such time upon the street. The building at the time of the collapse had reached a height of 120 feet above the street. It stood entirely upon private property. The entrance to it was five or six feet from the nearest edge of the sidewalk. The street upon which it abutted was between fifty and sixty feet wide, and the sidewalk about fifteen feet. If it be assumed that the condition of the structure, immediately preceding its collapse, was such that it did in fact imperil the safety of persons using the street, I am unable to see upon what principle of law the city can be held liable. It did not fall into the street and no person therein was injured. The plaintiff was at work in the building when it fell. The city cannot be held liable for a failure to pass an ordinance relating to the construction of buildings which would have prevented the collapse, or if such had been passed, for a failure to enforce the same. *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. Rep. 631, 105 Am. St. Rep. 709; *Leonard v. City of Hornellsville*, 51 App. Div. 106, 58 N. Y. Supp. 266."

APPEAL—REVIEW OF RECORD.—In *Whitaker v. Michigan Mutual Life Insurance Company (Ohio)*, 83 N. E. Rep. 899, is discussed the question of the right of a court of appeal to go outside the record in arriving at a decision. This was a case brought in the court of common pleas from which court it was appealed to the circuit court, where it was reversed. A new trial was had, and the case again appealed to the circuit court, where final judgment was rendered. Error was brought in the supreme court, and the supreme court found that in reaching its decisions, the circuit court had not

confined itself to the record in the case then before it, but also made use of its knowledge of the case on the former appeal. The circuit court took the position that its former judgment upon the weight of the evidence was an adjudication of the company's right to a verdict and judgment upon the evidence, and held that the right so determined should have been enforced by the trial court. The supreme court states that even if that were correct as a proposition of law, there were two reasons why it should not have been applied to the case at bar. First—That the trial court was a court of record and the record was presumed to be conclusive of what occurred. This record did not show that the evidence at the second trial was all read to the jury from a bill of exceptions used at the former trial, and that, therefore, there might have been evidence in the first trial which influenced the circuit court in reaching its decision, which was not in the evidence in the second trial.

The second point made by the supreme court was that the company had not requested a peremptory instruction and that the circuit court could not reverse the case on the ground that the court of common pleas had failed to give an instruction which was not requested, stating that error consists not in the failure to give an instruction, but in the refusal to give an instruction to which a party is entitled.

ARE CITIES AND TOWNS LIABLE FOR NEGLIGENCE IN THE MANAGEMENT OF PUBLIC PARKS?

According to the English law a park is an inclosed chase situated upon one's own lands.¹ A park must be inclosed, but a forest or chase are not.² Three things must be present to constitute a lawful park: first, the right of ownership; second, an inclosure by pale, wall or hedge; third, it must be stocked with untamed animals.³ This is the meaning of a park, according to the old English law, but in modern England the term "park" has practically the same meaning that it has in the United States. Recent statutes have been passed

(1) Black. Com. 38, where a park is distinguished from a forest, a chase and a free warren.

(2) Co. Litt. 233a.

(3) 2 Co. Inst. 199; *Howard's Case*, Cro. Car. 59.

providing for the dedication of land as an open, unfenced space for the use of the public as a place of recreation, and providing for the appointment of boards to frame by-laws and regulations for the prevention of nuisances and the preservation of order.⁴ In the United States a park is a piece of ground set apart and dedicated for the purpose of pleasure, recreation, exercise, amusement or ornament.⁵ It is a place for the resort of the public for recreation, air and light; a place to which every one may go.⁶ It is essential to the existence of a park that the land be dedicated to the public or to the people generally, and not to a restricted or limited class. Land dedicated to the trustees of a town for the benefit of the owners of land fronting thereon, to be ornamented and improved in such manner as the majority of such owners shall desire, is neither a public park nor the property of the town. It is still private property, and is liable to the ordinary taxes and assessments. Municipal corporations can not hold private property in trust for a restricted class so as to exempt it from taxation.⁷ Property taken for a public park is taken for public use.⁸ A park district, established by the vote of the people, is for certain purposes a *quasi* municipal corporation.⁹ The general rule that a municipal

corporation can be held liable only by express statute for neglect of duty from the performance of which they derive no compensation or benefit, is applied in actions against cities or towns for defects in parks or squares. But where the corporation derives pecuniary benefit from public property it is liable for negligence in managing or dealing with such property. This is the general rule as laid down by the books, and there are but few exceptions that can be cited. Practically all the cases bearing upon the subject, and in which a recovery was had for injuries because of such negligence, were cases in which the corporation either received a pecuniary profit or cases in which the park board had the care and management of a street on which an accident occurred. The only case that I have in mind that is directly contrary to the general rule is *Glaze v. City of Philadelphia*.¹⁰ This was a case in which the city had made a roof garden and a place of public resort on the top of a building used as a powerhouse for the city water supply. It was close to the river, and the back part of the building was low, and many people resorted there to rest and fish, and watch the boats ply up and down the river. In the roof was a man-hole, which was covered with an iron lid that turned on pivots in its circumference, and a boy stepped upon one edge, when the lid turned with him, and he partly fell into the hole and was injured. A recovery was had and sustained. The court said that the city was under no legal obligation to maintain places of amusement for its citizens, but if it did do so it was under obligation to use ordinary care to make them safe.

As was said above, where the corporation receives pecuniary profit, from public property, it will be liable for the negligent management of such property. Where, therefore, a municipality, through its servants, negligently left open an excavation adjoining a building situated upon the public common, from which building revenue

(4) Metropolitan Commons Act 1866; Metropolitan Commons Supplemental Act, 1877; *De Morgan v. Metropolitan Board of Works*, 49 L. J. M. C. 51, 5 Q. B. D. 155. See also *Fulk v. Metropolitan Board of Works*, 37 L. J. Q. B. 272, L. R. 3 Q. B. 682.

(5) *Perrin v. New York Cent. R. Co.*, 36 N. Y. 120.

(6) *Pierce v. Plainfield*, 40 N. J. L. 612. For further definitions see *Shoemaker v. U. S.*, 147 U. S. 282; *Archer v. Salinas City*, 93 Cal. 43; *U. S. v. Cooper*, 20 D. C. 104; *Holt v. Somerville*, 127 Mass. 413; *People v. Green*, 52 How. Pr. (N. Y.) 445.

(7) *McChesney v. People*, 99 Ill. 216.

(8) *Shoemaker v. U. S.*, 147 U. S. 282; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Matter of Central Park*, 63 Barb. (N. Y.) 282; *People v. Aridondack R. Co.*, 160 N. Y. 225.

(9) *West Chicago Park Coms. v. McMullen*, 134 Ill. 170.

(10) (Penn.) 32 Atl. Rep. 600.

was obtained in the form of rent, it was held liable for injury to one who fell into such excavation.¹¹ In the above cited case, Judge Gray, rendering the decision, said: "The distinction is well established between the responsibilities of towns and cities imposed upon them by the Legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. Such is the well settled rule in actions against towns or cities for defects in highways. 5 Edw. 4, 2 pl. 24; Riddle v. Proprietors of Locks and Canals, 7 Mass. 169, 187; Mower v. Leicester, 9 id. 247; Holman v. Townsend, 13 Metc. 297; Brady v. Lowell, 3 Cush. 121; Providence v. Clapp, 17 How. 161, 167. The same rule has been held to govern an action against a town meeting, by a legal voter therein for an injury while attending a town meeting, from the want of repair in a town-house erected and maintained by the town for municipal purposes only; or by a child, attending a public school, for an injury suffered from falling into a dangerous excavation in the school-house yard, the existence of which was known to the town, and which had been dug by order of the selectmen to obtain gravel for the repair of the highways of the town, and to make a regular slope from the nearest highway to the school house. Eastman v. Meredith, 36 N. H. 284; Bigelow v. Randolph, 14 Gray, 541. In the case at bar it appears from the report of the learned judge, who presided at the second trial, that the evi-

dence tended to show that the plaintiff, while walking, using due care, upon a foot-path which had been used by the public for more than twenty years, and which had been laid out and graded from time to time and prepared and cared for by the town and city of Worcester, and was within the public common which had been used by the inhabitants of the town for a much longer period, fell into a deep excavation, made by direction of a joint committee of the city council, under the authority and at the expense of the city, in the course of repairing and improving a building standing within the common, used by the city principally for municipal purposes, but a substantial portion of which, both before and after the time of the accident, the city leased, and received rent for, either from private persons or from the county, and which was therefore held and used by the city, not for municipal purposes exclusively, but in considerable part as a source of revenue; and that this excavation was within a few feet of the building, and was carelessly unguarded. If, in the course of repairing this building, the servants and agents of the city, acting by its authority, negligently suffered the adjoining land within its control to be in a dangerous condition, without proper notice to persons exposed to the danger, coming there rightfully under an implied invitation and license, and using due care, the city was responsible, as any private owner would be, for injury sustained by such a person by reason of such negligence; and it is immaterial whether the title in the land was or was not in the defendant. Carleton v. Franconia Iron & Steel Co., 99 Mass. 216."

Cities and towns are subject to the same liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own emolument or benefit. Thus, where a special charter, accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefitted thereby,

(11) *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

or to derive benefit in its own corporate capacity from the use thereof by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done any person in the negligent exercise of the powers so conferred.¹² So, where a municipal corporation holds or deals with property as its own, not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable to the same extent as he would be, for the negligent management thereof to the injury of others. In *Thayer v. Boston*,¹³ it was held that a city was liable for the acts of its agents, previously authorized or afterward ratified by the city, in obstructing a highway to the special and peculiar injury of an individual, by erecting buildings under a claim of title in the fee of the land, for which the city received rent. In *Anthony v. Adams*,¹⁴ the town was held not liable, solely because the act which occasioned the injury was one which the town had not authorized, and was not required by law to do. In *Bailey v. New York*,¹⁵ Chief Justice Nelson clearly stated the distinction between acts done by a city or town as a municipal or public body, exclusively for public purposes, and those done for its own private advantage or emolument; and assumed, as unquestionable, that "municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers and dealt with accordingly." In

Pittsburgh v. Grier,¹⁶ a city was held liable to a private action for an injury suffered by an individual by reason of a defect in a wharf, of which the city had exclusive control, and for the use of which it received wharfage. In *Eastman v. Meredith*,¹⁷ Chief Justice Perley said: "Towns and other municipal corporations, including counties in this state, have power for certain purposes, to hold and manage property, real and personal; and for private injuries caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." "So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another." And in *Mersey Docks, Trustees v. Gibbs*,¹⁸ the house of lords, upon an elaborate revision of the English cases, held that the trustees of the docks at Liverpool, incorporated by act of parliament for the purpose of making and maintaining docks and warehouses for the use of the public, with authority to receive rates for such use, which were to be applied exclusively to the maintenance of the docks and warehouses and the payment of the debt incurred in their construction, was liable to an action by an individual for an injury to his vessel in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently suffered to accumulate at and about the entrance.

But it was held in *Clark v. Waltham*,¹⁹ that there was no liability on the part of the city for injury to a boy, who, barefooted, stepped upon an iron post that had

(12) *Henley v. Lynn*, 5 Bing. 91; *Weet v. Rockport*, 16 N. Y. 161, note; *Weightman v. Washington*, 1 Black. 39; *Nebraska City v. Campbell*, 2 Black. 590; *Eastman v. Meredith*, 36 N. H. 289, 294; *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41, 51.

(13) 19 Pick. 511.

(14) 1 Mete. 284.

(15) 3 Hill, 531.

(16) 22 Penn. St. 54.

(17) 36 N. H. 295, 296.

(18) 11 H. L. C. 687; S. C. Law Rep., 1 H. L. 93.

(19) 128 Mass. 567.

rotted or rusted off, and injured his foot, though it was upon a public common and in a path used by pedestrians and although there was a building in the common used for pecuniary profit. The court placed the ruling on the ground that though there was a building in the common used for gain, that was remotely situated and the rusted post had no connection with or relation to such building and further that the path was no part of a public highway; also it was held in *Steele v. City of Boston*,²⁰ that the corporation was not liable to one injured by coming into collision with a sled on a park path where the city had given permission to coast. The court said: "There was no evidence offered that the footpaths on the common have ever been laid out as highways. The city holds the common for the public benefit, and not for its emolument, or as a source of revenue, and has constructed and kept in repair these paths as a part of the common for the comfort and recreation of the public, not as a part of its system of highways or streets. It is not liable under the statute for any defect or want of repair in them. *Oliver v. Worcester*, 102 Mass. 489; *Clark v. Waltham*, 128 Mass. 567. The plaintiff contends that, if there is no statute liability, the city is liable 'as owner of the land and the maker and repairer of the way upon which the plaintiff was invited to go.' If a private person owned a similar park to which he had given the public free access, we are at a loss to see how he could be held liable for an accident like that of the plaintiff. Such person, if he saw fit, might set apart and fit for use one of the paths for the recreation of youth in coasting and if any one should, as was the case with the plaintiff, choose to enter upon the path, seeing that it was set apart for that purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled. But even if a private owner would be liable, it does not follow that the city is. It maintains the

common solely for the benefit of the public. If there is any legal duty to keep the paths in a safe condition, it is solely a public duty for the breach of which no action lies by an individual who is injured, unless that statute gives such action. The city may legally set apart a portion of the common for the recreation of the young. The fact in this case that it did so, and that it used means to fit it for the purpose for which it was set apart, does not render it liable to the plaintiff for the injury which he sustained."

A city is not liable for failure to maintain a light at a point where the person injured came in contact with a fence, unless it be shown that the fence was out of repair, negligently constructed, or insufficient for the purpose intended.²¹ Neither is a city liable for injury received while walking on the grass in disobedience of warnings to "keep off the grass";²² nor for injuries occasioned to a person by his horse's becoming frightened by the firing of cannon on Boston Common under license granted in pursuance to a city ordinance.²³ The court said: "The city holds the common for the public benefit, and not for its emolument, or as a source of revenue. The use of it is dedicated to and belongs to the public." A city having an ordinance prohibiting the use of gun-powder, but allowing the mayor to grant permission to use it on certain occasions, is not liable for damages for injury caused by a licensee, in the absence of proof that the authorized act was intrinsically dangerous.²⁴ A city authorized to appropriate money to celebrate holidays, and undertaking a display of fireworks exclusively for the amusement of the citizens, is not liable to one injured by such

(21) *Platt v. New York* (N. Y. Super. Ct. Gen. T.), 8 Misc. (N. Y.) 409.

(22) *Sheehan v. Boston*, 171 Mass. 296.

(23) *Lincoln v. Boston*, 148 Mass. 580, 12 Am. St. Rep. 601.

(24) *Wheeler v. City of Plymouth*, 116 Ind. 158, 9 Am. St. Rep. 837.

(20) 128 Mass. 583.

fireworks through the negligence of the city's servants.²⁵ But a municipal corporation was held liable for a personal injury caused by the fright of a horse at a fire kindled in a street, in the conduct of a business, by permission of a corporation.²⁶ A city may be held responsible for the acts of park commissioners in wrongfully preventing the performance of a contract made with the city.²⁷ Where an injury occurs in a portion of a sidewalk which was at one time a portion of the adjacent common, but has been thrown into the street by the park authorities, the city is responsible as for an injury done in the street if there has been for more than twenty years a constant and uninterrupted use of the sidewalk by the public under a claim of right to use it as part of the public street and not as a part of the common.²⁸ It was held in *Carey v. Kansas City*,²⁹ that, as a matter of law, there was no negligence on the part of a city which surrounded a pond with a woven wire fence which was four and one-half feet high and which provided a watchman for the park and pond, and especially as the boy drowned, had been driven away many times by the watchman, he being in the habit of climbing the fence and stoning frogs and catching fish. *Schmidt v. Berlin*,³⁰ was a case in which a young man fell over an unguarded embankment in a public park. The embankment was close to a footpath and as he, together with a young lady came down the path, which was on a steep hill, her hair caught in a branch of a tree and he turned to assist her, when her

feet slipped and she fell against him, knocking him over the precipice. It was held that there was no liability. There was held to be no liability on the part of a city for failure to guard an embankment over which one fell into the Niagara river at the Falls and was injured.³¹ A city in the state of Washington is not liable for the negligence of its employees in improving a public park.³² The city of Brooklyn was held liable in damages where an officer of parks was negligent in the management of a particular street under his care, as the city was under a primary duty to care for its streets.³³ In Minnesota, a city is liable for negligence of the park board in the care of a street. As in the case above cited, the care of the street was in the park board.³⁴ In Rhode Island, there was held to be no liability for injury to one because of the negligence of itself or officers which resulted in injury to one in a parkway, though there may have been an incidental profit. The parkway was held not to be a highway.³⁵ Where plaintiff was injured by the fall of a public park stand, which had been negligently constructed under authority of the park commissioners of the defendant city, who had jurisdiction thereof, the city was liable.³⁶ However, in this case the park commissioners had rented stalls and stands situated in the park and erected the stand which fell and injured the plaintiff for the purpose of having singing and dancing and thus to attract a crowd and to increase the income of the city. In

(25) *Findley v. Town of Salem*, 137 Mass. 171, 50 Am. Rep. 289. and see *Ball v. Town of Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805.

(26) *Town of Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 121.

(27) *Mahon v. New York (C. Pl. Gen. T.)*, 10 Misc. (N. Y.) 664.

(28) *Veale v. Boston*, 135 Mass. 187.

(29) (Mo.), 86 S. W. Rep. 438.

(30) 26 Ont. Rep. 54.

(31) *Graham v. Queen Victoria, etc., Park*, 28 Ont. 1.

(32) *Russell v. Tacoma (Wash.)*, 35 Pac. Rep. 605.

(33) *Howard v. Brooklyn*, 51 N. Y. Supp. 1058.

(34) *Kleopfort v. Minneapolis (Minn.)*, 95 N. W. Rep. 908.

(35) *Blair v. Granger (R. I.)*, 51 Atl. Rep. 1042.

(36) *City of Denver v. Spencer (Col.)*, 82 Pac. Rep. 590.

an action against a city to recover damages sustained in falling over an embankment from a walk without guard rails in a public park, no recovery can be had by the plaintiff, where the evidence shows that the plaintiff was injured, not in the ordinary use of the walk, which was suitable for ordinary travel conducted in an ordinary manner, but by being pushed from the walk by the impact of a slipping or falling girl behind him.³⁷ In *Russell v. Tacoma*,³⁸ it was held that there was no liability on the part of a city for negligence of its agents in improving a public park. The court said: "It is frankly conceded on the part of the appellant that if the acts complained of were not proprietary merely, but public and governmental, the city is not liable in this action. While it is not always easy to draw the line between the public or governmental and private powers of municipal corporations, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good, and not for private corporate advantage; and, this being so, it is not liable for the acts or omissions of its officers in that behalf."

In *Muntaugh v. City of St. Louis*,³⁹ it was sought to make the city respond in damages for injury to a non-paying patient, caused by the negligence of hospital officers and servants; and, in speaking of the non-liability of municipal corporations for the acts of their officers and agents, the court declared the general result of the authorities as follows: "Where the officer of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable as in the case of private corporations or parties; but when the acts or omissions com-

plained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."

In *Mead v. New Haven*,⁴⁰ it was held that the city was not liable for the negligence of an inspector of steam boilers; and in *Ham v. Mayor*,⁴¹ it was held that the city was not liable for the negligence of servants employed by the department of public instruction. In *Findley v. Salem*,⁴² it was held, upon an elaborate review of the authorities, that the defendant city was not liable for the negligence of its servants in discharging fireworks which were purchased and used for the purposes of a public celebration. In *Howard v. Worcester*,⁴³ the plaintiff was injured by the negligent blasting of rock in excavating the foundation for a public schoolhouse, and the court held that, as the work was purely a benefit to the public, no liability was thereby created against the city.

It accordingly seems that the almost universal rule is that cities and towns are not liable for the negligence of their servants in the management of public parks, in the absence of an express statutory provision to that effect, unless the park or place of amusement is conducted for profit and even then, there seems to be no liability if the accident occurs at a remote distance from the place or places where money is taken in or gained, and in which there is no real connection between the part of the park which is conducted for profit and the scene of the accident. If, however, the entire park is devoted to making money, if that is the prime purpose of the park, a recovery can be had.

GEORGE W. PAYNE.

Indianapolis, Ind.

(37) *Rhine v. City of Philadelphia*, 24 Pa. Super. Ct. 564.

(38) 8 Wash. 136, 35 Pac. Rep. 605.

(39) 44 Mo. 479.

(40) 40 Conn. 72.

(41) 70 N. Y. 459.

(42) 137 Mass. 171.

(43) (Mass.), 27 N. E. Rep. 11.

APPEAL — REVIEW — DISCRETION — ORDER GRANTING NEW TRIAL.

STETZLER v. METROPOLITAN ST. RY. CO.

Supreme Court of Missouri, Division No. 1,
April 1, 1908.

An order granting plaintiff a new trial in the discretion of the trial judge will be sustained, particularly when the case turns on the weight of the evidence or on the conduct of counsel at the trial, if it appears that the court in granting a motion acted on grounds peculiarly within its discretion.

The court charged that plaintiff was a competent witness in her own behalf, and that the jury should consider her testimony in making up their verdict, but in determining its weight the jury should consider that she was the plaintiff testifying in her own behalf and her interest in the result of the suit; that whatever statements she made against her interest must be regarded as true, and that what she might say in her own favor should be taken as true or false as the jury might believe the same in consideration of all the evidence. Held, that such instruction was erroneous as calling the jury's attention to the weight of the testimony of a single witness, and also as charging that plaintiff's evidence against her interest must be regarded as true, whether deliberately or thoughtlessly given, while everything testified to in her favor should be scrutinized with care.

An instruction on the weight to be given to the testimony of witnesses should be limited to a general instruction that in weighing the evidence the jury should consider the interest, if any, the witnesses have, their demeanor on the stand, etc.

VALLIANT, P. J.: This is a suit for damages for personal injuries alleged to have been received by the plaintiff as the result of the negligent starting of a street car on which she was a passenger while she was in the act of alighting therefrom. The only witness for the plaintiff to the accident was the plaintiff herself. Her testimony was to the effect: That she was a passenger on the car. It stopped at the intersection of Ninth and Main streets to allow passengers to alight. That she was in the act of getting off the car, had gone out on the rear platform, had stepped down on the lowest step of the car. "I got my foot in the air ready to step off, and the car went with a jerk and threw me." She stated that there were two men getting off the car at that time. One was a young man with a grip. He had asked the conductor about going to the Union Depot, and when the car stopped he got off before plaintiff. The other got off after her. The other evidence in plaintiff's behalf related to the nature of her injuries. The testimony on the part of the defendant was to the effect that the plaintiff alighted safely from the car and advanced to the sidewalk, and af-

ter getting on the sidewalk tripped and fell. The trial resulted in a verdict for the defendant. Plaintiff filed a motion for new trial, which the court sustained, and the defendant appealed.

The only ground on which the motion for a new trial was sustained, as stated by the court, was that counsel for the defendant in his argument to the jury had misstated the evidence of one of the witnesses for the defendant. The ruling on that point presents the first question for our consideration. The defendant called as a witness a physician who had attended the plaintiff and had treated her for her injuries. As some question was likely to arise as to the competency of this witness' testimony, the court directed that the jury be sent out of the room. After the jury had retired the counsel for defendant was directed to ask the witness such questions as he intended to ask when the jury should be recalled, this with a view to enable the court to judge of the competency of the evidence, a course of procedure which we will take this occasion to say was very wise and judicious. In the absence of the jury, after the witness in answer to questions by counsel for defendant had stated that he was a practicing physician, and that he had been called to attend the plaintiff, and had continued to attend her for about two months, the following occurred: "By the court: Q. You waited on her. Did she at any time tell you of any hurt she had received or injuries that she had? A. She did. Q. You may state what she said in reference to the manner in which she received these injuries? A. She said she was on the Metropolitan car on Main street coming north, and when she got to Ninth and Main streets, where she was going to get off, she had heard the conductor talking to a man in the car that wanted to go to the Union Depot, and the conductor told him he would have to hurry to catch the Ninth street car, and the man as she started to get off—the man brushed against her, and she fell from the car." While the jury was still out counsel for defendant stated to the court in the way of an offer what he purposed to show by this witness, in which statement he made no reference to what the plaintiff said to the witness about the accident, but it related only to the physical condition in which the witness found her and during his treatment of her, at the conclusion of which offer the counsel for the plaintiff said they made no objection to it. The jury then came in, and the trial was resumed, with the physician as a witness for the defendant on the stand. His testimony was on the line of the offer above stated. He was not asked in regard to anything the plaintiff said to him about the accident or how it

occurred. In his argument before the jury the counsel for the defendant said: "Why did not the plaintiff put Dr. ——— (naming the physician) upon the stand? I will tell you why. They did not dare do so. They knew that he would testify, as he has testified in this case, that the plaintiff told him she had been pushed off the car by a young man with a suit case." When this statement was made counsel for the plaintiff immediately objected, and stated that there was no such testimony by the physician, and he objected to any argument based thereon, and requested the court to reprimand the counsel for defendant and to instruct the jury to disregard such argument; but the court refused the request, saying at the time that the jury would remember the evidence. Thereupon counsel for defendant said that he would submit to the jury whether or not there was such evidence, and that, if there was not such evidence, that fact should count against him, and again asserted that there was such evidence. Counsel for plaintiff again stated that there was no such evidence, and asked the court to reprimand counsel for defendant, and asked that the stenographer's notes be read to the jury; but the court refused the request, and said the jury should determine whether or not there was such evidence in the case. In ruling on the motion for a new trial the trial judge delivered a written opinion in which he said: "This motion must be sustained because of the error of counsel for defendant in misstating the testimony in his argument to the jury." Then, after citing and quoting decisions on the point, the trial judge continued: "The court likewise erred in refusing to reprimand counsel for the misstatement. It is due to the able counsel for defendant to say that without question his argument was made in the best of faith, believing the facts were in evidence, but he was mistaken, and the court was mistaken in failing to take prompt measures to correct the mistake. Error is presumed prejudicial, and in a close case like this, where error has undoubtedly intervened, the interests of justice demand a new trial be had."

1. A motion for a new trial is to a great degree addressed to the judicial discretion of the trial judge, and an appellate court is reluctant to interfere with the exercise of that discretion. Particularly is this so when the case turns on the weight of the evidence, or on the conduct of the counsel in the trial. The trial court is better able than is the appellate court to estimate the value of the evidence and the effect on the jury of the conduct of the parties during the trial. Therefore it has always been the rule to sustain the action of the trial court in granting a new trial, if it appears that the

court in doing so acted on grounds peculiarly within the domain of its discretion, and the record so shows. In fact the appellate courts often express regret that the trial courts do not more frequently exercise their power within that domain. There was just enough evidence in this case to render the misstatement of the evidence complained of very significant. The plaintiff in her testimony had said that two men were getting off the car at that time, one with a grip (by which we understand, a valise, or traveling bag of some kind), aiming to go to the Union Depot; that the conductor had told him that if he would hurry he would catch the Ninth street car that was going to the station; and that when she got off he was coming on behind her. Here, then, we have a man with a traveling bag in his hand in a hurry to get off the car, and following closely behind the plaintiff while she was on the platform or the step of the car, and with that picture in the jury's mind the counsel states that the witness said that the plaintiff told him that the man with the grip brushed against her and she fell off. It was a critical point in the evidence, and although, when the counsel for defendant made the assertion that counsel for plaintiff disputed it, yet it was reasserted, and, when the court was appealed to to correct the mistake, the court did not at that time feel justified in doing so, but ruled in effect that whether the witness had or had not said so was a question which the jury should settle for themselves. But, when the motion for a new trial came on for consideration, the court was satisfied that wrong had been done, and that the ends of justice called for a new trial. We do not feel justified in reversing that ruling of the trial court in a matter so peculiarly within its judicial discretion.

2. The respondent contends that, even if the court erred in granting a new trial on the ground stated, yet there were other errors which justified the ruling, and she points out the giving of the following instruction: "The court instructs the jury that the plaintiff is a competent witness in her own behalf, and you must consider her testimony in making up your verdict, but in determining what weight and value you will give to her testimony you may take into consideration with all the other facts and circumstances in evidence before you, the fact that she is the plaintiff testifying in her own behalf, and her interest in the result of the suit. Whatever statements, if any, that she may have made against her own interest must be regarded as true. What she may say in her own favor is to be taken as true or false, as you may believe it to be true or false when taken into consideration with all the other facts and circumstances detailed in

evidence before you." The giving of that instruction was error. An instruction in substantially the same form was approved by a majority of this court in *Feary v. Railway*, 162 Mo. 105, 62 S. W. Rep. 452; but that case on that point has been practically overruled in *Conner v. Railway*, 181 Mo. 415, 81 S. W. Rep. 145, *Montgomery v. Railway*, 181 Mo. 477, 79 S. W. Rep. 930, *Sheperd v. Transit Co.*, 189 Mo. 363, 87 S. W. Rep. 1007, and *Zaender v. Transit Co.*, 206 Mo. 445, 103 S. W. Rep. 1006. The interest that a witness has in the litigation may be shown to be considered by the jury in weighing her evidence, but when that fact is shown the jury should be left to exercise its own judgment as to the weight to be given the testimony. It has so long been the practice for the courts to instruct the juries that in weighing the evidence they shall consider the interest, if any, the witnesses have, and their demeanor on the stand, that no question is now raised as to general instructions of that kind, but, if the courts have the right to instruct at all on that subject, that is as far as they should go, and even to that extent instructions should not be given unless there is evidence to justify them. But the court has no right to single out a particular witness, whether she be a party to the suit or not, call attention to her interest as an inducement liable to cause her to give false testimony, for that is what the warning means, and tell the jury to be careful how they give credence to what she may say. The jury are the sole judges of the credibility of the witnesses, and they know as well as the judges know that interest often influences the testimony of a witness; that, even when there is no intentional false swearing, the wish is often father to the thought, and it sometimes colors memory. Those are facts of common experience. They influence men in their everyday transactions, and they influence men in the jury box. It is a common sense proposition concerning which men of ordinary intelligence need no instruction.

There is another error in this instruction, to-wit, after singling out the plaintiff and cautioning the jury to beware of the influence of her interest on her testimony, it tells them, in effect, that every word she may have uttered which militates against her interest, whether deliberately or thoughtlessly, solemnly or lightly, is to be set down as truth, while everything she may have said in her own interest is to be scrutinized with care. We do not mean, of course, that such was the language of the instruction, but such was the meaning that it was liable to convey. There are admissions that are indisputable, for example, admissions

in the record, and there are admissions made with deliberation and for a purpose which, though disputable, are entitled to great weight as evidence, and there are admissions that fall from the lips in thoughtless or careless conversations that are entitled to but little weight. But this instruction draws no distinction.

3. The court also gave for the defendant the following instruction: "The court instructs the jury that in this case the mere fact that the plaintiff was injured while alighting from a car of a street railway company gives her no right to sue and recover damages therefor from such street railway company. Before she can recover in this case, you must not only find that the defendant street railway company was negligent in the particular and specific respects submitted in these instructions, but you must further find that such negligence was the direct cause of the injury, and even then she cannot recover in this case if she was negligent and her negligence directly contributed to her injury." That instruction was erroneous, because there was no evidence at all tending to show that the plaintiff was guilty of contributory negligence. She was either thrown off by the sudden starting of the car, as her testimony tends to prove, or else she got off safely, walked to the sidewalk, and there tripped and fell, as the defendant's testimony tended to prove. There is not a word of evidence tending to show that in the act of getting off the car she was negligent.

The trial court was right in granting a new trial. The judgment is affirmed. All concur.

Note.—Discretion of Court in Granting New Trial.—The courts are unquestionably clothed with large discretion in the matter of granting new trials. This discretion should be soundly exercised, and the appellate courts are slow to interfere with its exercise. Thus it is held in *McAllister v. Burrill*, 98 Mass. 334, that a motion to set aside a verdict as contrary to law and public policy is addressed to the discretion of the court, and a motion asking the court to so rule is addressed to the discretion of the court. See also *McKnight v. Wells*, 1 Mo. 13.

This does not mean, however, that where reversible error has been committed by the trial court in the admission or rejection of evidence or in the instruction that the granting of a new trial rests in the discretion of the court. In such a case the court would be bound to grant a new trial, and failing to do so, the appellate court would order a new trial. *Hastings v. The Uncle Sam*, 10 Calif. 341; *O'Brien v. Brady*, 23 Calif. 243; *Humphreys v. Hoyt*, 4 G. Greene (Iowa), 245; *Riley v. Monohan*, 26 Iowa, 507; *Harrington v. Worcester, L. & S. St. Ry. Co.*, 157, Mass. 579, 32 N. E. Rep. 555.

Of special interest is that portion of the principal case wherein the court suggests that the interests of justice would be furthered by a more frequent exercise of its discretion in the granting of new trials by the trial court.

Credibility of Witnesses—Singling Out Witnesses.—It will be recalled that under the ancient practice parties to a suit were not permitted to testify, it being presumed that because of their interest they could not testify truthfully. This rule has long been abrogated, so that at the present time the parties to a suit are competent witnesses in their own behalf. From time to time some lawyer, ambitious to at one time win his case, and at the same time acquire fame, has endeavored to upset precedent by having the advantage of the testimony of his own client, and at the same time having the testimony of the opposing party impeached, practically, by the instructions of the court. So far the courts have not responded to this ingenious effort. Nevertheless the point is being frequently presented to the appellate courts. The principal case is the second decision within a very short time by the supreme court of the state of Missouri sending cases back with directions to grant a new trial substantially on the ground that the court in its instructions has singled out the plaintiff, commenting upon the interest of the plaintiff in the outcome of the suit, and telling the jury they were at liberty to consider that interest as affecting the credibility of the plaintiff. 30 Am. & Eng. Enc. of Law (2 ed.), 911. In probably every one of the states statutes have been adopted removing the disqualification of the common law, so that the parties to litigation are now permitted to freely testify. The instruction complained of in the principal case, if permitted to stand, would partially restore the old doctrine of disability. See *Mine v. State*, 63 Ga. 318; *Henderson v. Miller*, 36 Ill. App. 232; *Letten v. Young*, 59 Ky. 558; *Wastl v. Montana Union R. Co.*, 17 Mont. 213, 42 Pac. Rep. 772; *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604; *Little v. Superior Rapid Transit Ry. Co.*, 88 Wis. 402, 60 N. W. Rep. 705.

The foregoing authorities deal with the question of instructions as to falsity of testimony, or in other words, cases in which the trial courts have undertaken to usurp the functions of the jury, by instructing them as to credibility to be given certain portions of the evidence.

The following authorities deal with the question of the interest of witnesses, and singling out witnesses; *Nelson v. Vorce*, 55 Ind. 455; *Woolen v. Whitacre*, 91 Ind. 502; *Ruval v. Kenton*, 127 Ind. 178, 26 N. E. Rep. 888; *Willis v. Whitsitt*, 67 Tex. 673, 4 S. W. Rep. 253.

In *Zander v. Transit Co.*, 206 Mo. 445, the court held the instruction erroneous in that it singled out the plaintiff as a witness, thereby usurping the province of the jury. In that case the court says: "Such instructions in civil cases are a direct comment upon the weight of the plaintiff's testimony, and are not to be tolerated."

BOOK REVIEWS.

ENCYCLOPEDIA OF EVIDENCE. VOL. 11.

The volume is peculiarly rich in subjects of importance. The first title found is "References," and the last title in the volume is "Stamp Act." The various subjects are treated in a most thorough manner. A clear statement of the law is contained in the text, which is supported by authorities cited in the foot notes. Among the many important subjects dealt with in the present volume may be mentioned, References, Reformation, Release, Re-

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JETSAM AND FLOTSAM.

POETIC GROUNDS FOR DIVORCE.

Our esteemed correspondent at Durant, Oklahoma, sends us a copy of the following complaint filed in the federal court at that place: Lewis Tonubbee,

Plaintiff,

v.

Malissa Tonubbee,
Defendant.

Now comes the plaintiff herein and for his cause of divorce says and alleges:

I.

That the plaintiff and the defendant were married on March 25th, A. D. 1905, and lived together as man and wife until February 8th, 1907, when the defendant, without any just cause, left this plaintiff's house and has not returned since. That before she left this plaintiff's house she became so cross and ill and quarrelsome that this plaintiff's condition was rendered intolerable. She would fuss and quarrel at the plaintiff all the time while he was about his house, and would not let this plaintiff see any peace while he was in her sight. This plaintiff says he treated the defendant kind and affectionately as a man should his wife, but that the more kindly he treated her the more quarrelsome and abusive she became toward the plaintiff. Wherefore this plaintiff says that it will be utterly impossible for this plaintiff to longer live with the said defendant in any peace or satisfaction.

"The contentions of a wife are a continual dropping."—Prov. 14-13.

"It is better to dwell in the corner of the house top, than with a brawling woman in a wide house."—Prov. 21-9.

II.

Plaintiff says that this marriage occurred in the Central District of the Indian Territory and that the plaintiff and the defendant have resided in said district ever since the said marriage and that this cause of divorce accrued within five years last past.

III.

Wherefore this plaintiff prays a decree of this honorable court dissolving the bonds of matrimony heretofore existing between this plaintiff and the defendant both from bed and board.

Plaintiff.

HUMOR OF THE LAW.

A young lawyer, whoses cases were few, was asked to defend a poverty-stricken tramp accused of stealing a watch. The lawyer pleaded with all the ardor at his command, drawing so pathetic a picture with such convincing energy that, at the close of his argument, the court was

In tears, and even the tramp wept. The jury deliberated but a few minutes and returned a verdict of "Not guilty." Then the tramp drew himself up, tears streaming down his face as he said: "Sir, I have never before heard so grand a plea. I have not cried since I was a child. I have no money with which to reward you, but" (drawing a package from the depths of his ragged clothes' "here's that watch; take it and welcome."—Judge's Library.

WEEKLY DIGEST.

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1. **Abandonment**—Property Not in Possession.—One who wishes to preserve his right to property not in possession must act with reasonable diligence in the assertion of his right.—Nelson v. Blinn, Mass., 83 N. E. Rep. 889.

2. **Abatement and Revival**—Assignment of Cause of Action.—The insolvency of and the appointment of a receiver for the original plaintiff, who has assigned the cause of action prior to the receiver's appointment and since the action was begun, does not prevent the prosecution of the action in the original plaintiff's name.—McCague Sav. Bank v. Croft, Neb., 115 N. W. Rep. 315.

3. **Accident Insurance**—Return of Premium.—Tender of bill of exchange for the amount of premiums received is insufficient as a return or tender of such premiums.—United States Health and Accident Ins. Co. v. Clark, Ind., 83 N. E. Rep. 760.

4. **Account**—Judgment Where There Are Two Defendants.—In an equitable action for an accounting where the property sought to be recovered is held separately by two defendants, a judgment against the two defendants jointly for the total amount retained by them is erroneous; but the court should ascertain the separate liability of each defendant, and award judgment as to each accordingly.—Eisentraut v. Cornelius, Wis., 115 N. W. Rep. 142.

5. **Action**—Splitting Causes of Action.—The damages to real estate resulting from the construction of a permanent structure are recoverable in one action, and the owner must sue for all the damages, past and future.—King v. Board of Council of City of Danville, Ky., 107 S. W. Rep. 1189.

6. **Adjoining Landowners**—Lateral Support.—At common law the owner of lands on which there are no buildings or other superstructures is entitled to lateral support from the lands of his neighbor.—Village of Haverstraw v. Eckerson, 108 N. Y. Supp. 506.

7. **Adverse Possession**—Acts of Possession.—Cutting hay, tying a horse on the premises, and similar acts do not constitute adverse possession of uninclosed land.—Illinois Cent. R. Co. v. Hasenwinkle, Ill., 83 N. E. Rep. 815.

8.—**Color of Title**.—Where title by adverse possession is established by one tenant in common against his co-tenants, the instrument under which both claimed originally operates in favor of the claimant by adverse possession as color of title.—Russell v. Tennant, W. Va., 60 S. E. Rep. 609.

9.—**Color of Title**.—A deed to tenants in common gives good color of title to one of such tenants, and actual and exclusive possession under known boundaries pursuant to a division of the premises by the parties in interest for seven years at law gives an indefeasible title as against one not claiming to be a tenant in common.—Sutton v. Jenkins, N. C., 60 S. E. Rep. 643.

10.—**Evidence**.—A party claiming title by adverse possession, who testifies that he has been in possession of part of the land for more than seven years, will not be construed to claim that he has been in possession seven years before suit brought.—Payton v. Stephens, Ga., 60 S. E. Rep. 563.

11. **Appeal and Error**—Admission of Evidence.—Where the evidence was undisputed that plaintiff was injured by falling through an elevator shaft, the error, if any, of admitting evidence that witness had often seen the elevator door standing open on other days, was harmless.—Baker v. Best, Ky., 107 S. W. Rep. 1192.

12.—**Assignment of Error**.—That the court rejected evidence to prove the same fact sought to be established by evidence subsequently offered held not a basis for an assignment of error on the admission of the latter evidence.—Southern Ry. Co. v. Hardeman, Ga., 60 S. E. Rep. 539.

13.—**Failure to Set Out Instructions**.—Where, on appeal, the court's charge is not set out in full in the record, it will be presumed that he charged correctly as to all the issues, in the absence of any showing to the contrary.—Gerock v. Western Union Telegraph Co., N. C., 60 S. E. Rep. 637.

14.—**Objections Not Raised Below**.—In an action on a contract for the sale of land, appellant's contention that the contract was void under the statute of frauds cannot be raised for the first time on appeal.—Schuyler v. Wheelon, N. D., 115 N. W. Rep. 259.

15.—**Pleading**.—Where defendant demurred to each paragraph of the complaint, and on the overruling of the demurrer there was a separate exception to the ruling on a paragraph, the exceptions were separate, and not in gross.—Evansville & T. H. R. Co. v. Yeager, Ind., 83 N. E. Rep. 742.

16.—**Scope of Review**.—Where the trial

court held that parties were not entitled to a hearing on cross-petition filed in a suit tried on the equity side of the calendar, cross-petitioner was entitled to appeal for the review of such question alone.—*Novak v. Novak*, Iowa, 115 N. W. Rep. 1.

17.—**Time of Entry of Judgment.**—Where appellee died after the submission of the cause and the judgment is affirmed, judgment on appeal will be entered as of the date of submission.—*United States Health and Accident Ins. Co. v. Clark, Ind.*, 83 N. E. Rep. 760.

18.—**Transfer of Property.**—Where defendant in a garnishee action does not raise objection that judgment has not been entered in the principal action, he cannot raise it for the first time on appeal.—*Mahon v. Fansett*, N. D., 115 N. W. Rep. 79.

19.—**Assignment for Benefit of Creditors.**—Assignee's Bond.—Where bankruptcy proceedings were instituted after an assignment for the benefit of creditors, the assignee was entitled to account in the bankruptcy court, so as to render the surety liable for the assignee's failure to perform the judgment on the accounting.—*Cohen v. American Surety Co. of New York*, 108 N. Y. Supp. 385.

20.—**Attachment.**—Property Subject to.—Means by which money in hands of surety on appeal bond to secure him from liability came into his hands held not to render liable to attachment as the property of the principal in the appeal bond.—*Guthrie v. Waite*, Mo., 107 S. W. Rep. 1110.

21.—**Wrongful Attachment.**—Malice, authorizing the recovery of exemplary damages for an attachment, is not to be inferred from the mere finding that nothing was due by reason of a counterclaim.—*Ahrens v. Fenton*, Iowa, 115 N. W. Rep. 233.

22.—**Attorney and Client.**—Compensation.—Where a client, after having employed respondent as attorney, agreed to pay him an excessive and unreasonable fee, the court will inquire into the reasonableness of the transaction.—*Bar Ass'n of Boston v. Hale*, Mass., 83 N. E. Rep. 885.

23.—**Stipulations.**—An attorney employed in two different suits, the interests of his clients being the same in each, may stipulate that the trial of one shall determine the other.—*Commercial Union Assur. Co., Limited, of London v. Chattahoochee Lumber Co., Ga.*, 60 S. E. Rep. 564.

24.—**Bankruptcy.**—Fraudulent Conveyances.—Under Bankr. Act, c. 541, sec. 70a (4), a trustee of a bankrupt held entitled to sue to set aside a fraudulent conveyance by the bankrupt, where the grantee participated in the fraud, or where the conveyance was voluntary.—*Putnam v. Southworth*, Mass., 83 N. E. Rep. 887.

25.—**Right of Trustee to Sue on Assignee's Bond.**—A bankrupt's trustee can sue on the bond of the bankrupt's assignee for the benefit of creditors to recover an amount found due on an accounting.—*Cohen v. American Surety Co. of New York*, 108 N. Y. Supp. 385.

26.—**Banks and Banking.**—Insolvency.—Owners of a fund held by a national bank and appropriated to its use held entitled to stand as general creditors and to share in dividends out of the bank's assets.—*Emigh v. Earling*, Wis., 115 N. W. Rep. 128.

27.—**Insolvency.**—A bank for which a temporary receiver had been appointed held entitled to have the receiver discharged, and to be permitted to resume business.—*People v.*

Hamilton Bank of New York City, 108 N. Y. Supp. 461.

28.—**Bills and Notes.**—Bona Fide Purchasers.—The doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal held not to apply to currency or negotiable instruments.—*Perry v. Oerman & Blaebaum*, W. Va., 60 S. E. Rep. 604.

29.—**Purchase Money Note.**—Where a note was given to secure the note of a purchaser on a machine, the maker of the collateral note could show a mistake as to the time allowed for testing the machine, though the answer did not technically ask that the contract be reformed.—*Northwest Thresher Co. v. Hulburt*, Minn., 115 N. W. Rep. 159.

30.—**Bonds.**—Transfer of Legal Title.—It is not necessary, in order to convey the legal title to registered bonds, that the bonds be surrendered and new ones taken; but a proper indorsement and delivery is all that is necessary.—*Kelly v. Bell, Ind.*, 83 N. E. Rep. 773.

31.—**Boundaries.**—Technical Errors.—The courts will uphold boundaries where a slight discrepancy in a call may be disregarded and the territory attempted to be described ascertained.—*Williams v. State*, Tex., 107 S. W. Rep. 1121.

32.—**Breach of Marriage Promise.**—Pleading.—Where, in an action for breach of marriage promise, the answer was a mere general denial, rescission or abandonment of the contract held not in the case, but that they should have been pleaded in avoidance.—*Salchert v. Reinig*, Wis., 115 N. W. Rep. 132.

33.—**Brokers.**—Contract of Employment.—A contract employing a broker to procure a purchaser construed, and held to provide for a commission either on the making of a sale by the broker or on the production of a purchaser ready, willing and able to buy.—*McDermott v. Mahoney*, Iowa, 115 N. W. Rep. 32.

34.—**Canals.**—Obstruction.—A barge negligently moored to the bank of a canal, which, because of such negligence, floats out into the channel of the canal, causing a collision with a passing vessel, is clearly within the meaning of the term obstruction.—*Gillikin v. Lake Drummond Canal & Water Co., N. C.*, 60 S. E. Rep. 654.

35.—**Cancellation of Instruments.**—Pleadings.—In an action by heirs to set aside a deed executed in consideration of personal services to be rendered to the grantor, it cannot be assumed, in the absence of averments to the contrary, that such services were not rendered as agreed.—*Studabaker v. Faylor*, Ind., 83 N. E. Rep. 747.

36.—**Relief Awarded.**—In a suit by a purchaser to rescind the contract of sale and recover the consideration, recovery of the value of the use of a horse delivered by the purchaser to the vendor as part consideration held not authorized.—*Wolfinger v. Thomas*, S. D., 115 N. W. Rep. 100.

37.—**Carriers.**—Defective Brakes.—In an action against a street railway for injuries to a passenger in a collision between a freight car and a passenger car, evidence held sufficient to go to the jury on the question whether the brakes on the freight car were defective.—*Rouston v. Detroit United Ry., Mich.*, 115 N. W. Rep. 62.

38.—**Delay in Furnishing Cars.**—Where damage to a shipper from delay in furnishing a car accrues before a contract limiting the liability of the carrier is executed, the contract is inadmissible in evidence in an action against

- the carrier for delay.—*Missouri & N. A. R. Co. v. Sneed, Ark.*, 107 S. W. Rep. 1182.
- 39.—**Ejecting Passenger.**—A railroad company cannot in chartering one of its trains enter into such a contract as will exempt it from liability for negligence and willful misconduct of the charterer in ejecting a passenger from such train.—*Kirkland v. Charleston & W. C. Ry. Co., S. C.*, 60 S. E. Rep. 668.
- 40.—**Liability of a Common Carrier.**—The ordinary liability of a common carrier of goods is that of insurer against all risks incident to transportation, save such as result from the act of God or public enemy.—*Swiney v. American Express Co., Iowa*, 115 N. W. Rep. 212.
- 41.—**Commerce—Nursery Regulations.**—The state can prescribe police regulations to prevent the spread of disease among plants and nursery stock, whether grown within the state or sold for planting within the state as interstate commerce.—*Ex parte Hawley, S. D.*, 115 N. W. Rep. 93.
- 42.—**Conspiracy—Combination to Injure Public.**—Conspiracies to cheat a state or county or city are indictable as a combination to injure the public.—*People v. Miles*, 108 N. Y. Supp. 510.
- 43.—**Constitutional Law—Delegation of Legislative Powers.**—Laws 1907, p. 339, c. 252, providing for the curbing or macadamizing of highways in civil townships, and for construction of sewers and water mains, is unconstitutional as an unlawful attempt to delegate legislative powers to individual property owners on certain highways.—*Morton v. Holes, N. D.*, 115 N. W. Rep. 256.
- 44.—**Delegation of Legislative Powers.**—The legislature may not delegate its power to make law involving a discretion as to what the law shall be, but may confer discretion as to the execution of a law to be exercised under and in pursuance of law.—*People v. Grand Trunk Western Ry. Co., Ill.*, 83 N. E. Rep. 839.
- 45.—**Equal Protection of Laws.**—Laws 1907, p. 414, c. 194, sec. 2, requiring agents selling foreign grown nursery stock in South Dakota to carry a duplicate permit issued by the State Board of Agriculture, held invalid as a discrimination against nonresident dealers.—*Ex parte Hawley, S. D.*, 115 N. W. Rep. 93.
- 46.—**Contempt—Assignment of Error.**—Where an order of imprisonment imposed in case of any failure to pay a fine for civil contempt did not limit the duration of the imprisonment, the question will not be considered on appeal, unless raised by the party so sentenced.—*In re Westminster Realty Corp.*, 108 N. Y. Supp. 551.
- 47.—**Fictitious Bail.**—Where parties were moved against for civil contempt for furnishing straw bond and bail, they will not be presumed innocent of fraud because the details of their dealings in securing the fraudulent bonds cannot be shown.—*In re Westminster Realty Corp.*, 108 N. Y. Supp. 551.
- 48.—**Contracts—Implied Contracts.**—By reason of the relation of parties or the existence of an obligation or duty, a contract may be implied by law which a party never actually intended to enter into, and the obligation of which he did actually intend never to assume.—*Chudnovski v. Eckels, Ill.*, 83 N. E. Rep. 846.
- 49.—**Conversion—To Subject Property to Taxation.**—The law of equitable conversion will not be invoked merely to subject property to taxation, especially when the jurisdiction of different states is involved.—*McCurdy v. McCurdy, Mass.*, 83 N. E. Rep. 881.
- 50.—**Corporations—Compensation of Officers.**—In the absence of an express contract made prior to the performance of the services, an officer of a corporation cannot maintain an action for compensation.—*Caho v. Norfolk & S. Ry. Co., N. C.*, 60 S. E. Rep. 640.
- 51.—**Corporate Powers.**—Where a railroad company by its charter was invested "with all the rights, privileges, and immunities granted to" another named company, the charter of the latter company was admissible to ascertain rights, privileges, and immunities conferred upon the former.—*Southern Ry., Carolina Division, v. Howell, S. C.*, 60 S. E. Rep. 677.
- 52.—**Liability of Subscribers to Stock.**—Subscribers to the capital stock of a corporation are liable for debts incurred in the process of organization or in preparing to begin business, whether the capital has all been subscribed for or not.—*Myers v. Sturges*, 108 N. Y. Supp. 528.
- 53.—**Criminal Evidence—Credibility of Witness.**—Where a witness admitted on cross-examination that he had been charged with murder and robbery, it is not error to charge the jury to consider such admission only in passing on the credibility of the witness.—*Tabor v. State, Tex.*, 107 S. W. Rep. 1116.
- 54.—**Identity of Clothing.**—A daughter of deceased held properly allowed to identify trousers worn by him at the time of the homicide, in which there was a bullet hole, though they had since been washed.—*State v. Gallman, S. C.*, 60 S. E. Rep. 682.
- 55.—**Remarks of Judge.**—It is not an expression of opinion for the judge to state the answer of a witness to a question, and the fact that he inaccurately states such answer is not cause for a new trial, where the inaccuracy is not harmful.—*Herrington v. State, Ga.*, 60 S. E. Rep. 572.
- 56.—**Criminal Law—Privilege of Witness.**—That the court refused defendant's request to notify a witness for the state that he need not answer questions where the answers would criminate him is not reversible error.—*Moore v. State, Ga.*, 60 S. E. Rep. 544.
- 57.—**Criminal Trial—Assuming Fact Admitted.**—The plain meaning of defendant's statement being that he accidentally shot decedent, it was not error to charge that there was no denial that the homicide was committed.—*Lyles v. State, Ga.*, 60 S. E. Rep. 578.
- 58.—**Prejudicial Remarks of Court.**—Remarks of the court intimating that counsel was attempting to tell a witness what answer was desired to a question, and that he was repeating a witness' answer incorrectly, are improper.—a witness' answer incorrectly, are improper.—*People v. Fiori*, 108 N. Y. Supp. 416.
- 59.—**Damages—Breach of Contract.**—A contract held too indefinite to be the basis for a recovery of profits which might have been made had the performance of the contract not been prevented.—*New Domain Oil & Gas Co. v. Feeley & Dimick, Ky.*, 107 S. W. Rep. 1185.
- 60.—**Loss of Profits.**—Where defendant's breach of contract for the sale of a news and checking privilege resulted directly in loss of profits to plaintiffs, and there was some evidence authorizing substantial damages, such profits were recoverable.—*Nash v. Thousand Island Steamboat Co.*, 108 N. Y. Supp. 336.
- 61.—**Dedication—Nature and Requisites.**—Any act which clearly indicates the intention of the owner to set apart lands for use as a public highway is a sufficient dedication; no particular form of dedication being necessary.—*Carter v. Barkley, Iowa*, 115 N. W. Rep. 21.
- 62.—**Descent and Distribution—Liability of Distributees of Personality.**—The liability of dis-

tributees of the personal estate of a surety on an administrator's bond for a claim arising after administration held several, and not joint, so that recovery could be had against them for pro rata shares.—*State v. Burnes, Mo.*, 107 S. W. Rep. 1094.

63. **Divorce**—Adultery.—Though marriage and cohabitation with a second husband is conclusive proof of sexual intercourse, even while the first husband is living, a second marriage alone does not furnish such proof.—*Taylor v. Taylor*, 108 N. Y. Supp. 428.

64.—Petition.—A petition for divorce on the ground of indignities, although sufficient to support a judgment for a divorce, should charge with more particularity the indignities shown by the evidence.—*Rose v. Rose, Mo.*, 107 S. W. Rep. 1089.

65. **Electricity**—Contributory Negligence.—In an action for injuries to a lineman, owing to his having brought his hand in contact with a live uninsulated wire, the question of plaintiff's contributory negligence held one for the jury.—*Dutcher v. Rockland Electric Co.*, 108 N. Y. Supp. 567.

66. **Eminent Domain**—Conflicting Claims.—Where it is impossible to determine to whom of several parties claiming title the award should be paid, it may, under the statute, be paid to the county treasurer, to be paid to a party entitled thereto.—*Metropolitan West Side Elevated Ry. Co. v. Eschner, Ill.*, 83 N. E. Rep. 809.

67.—Tenants in Common.—Where the petition alleges that land is owned by several persons, they will be presumed to be tenants in common, and the verdict may find a gross amount.—*Metropolitan West Side Elevated Ry. Co. v. Eschner, Ill.*, 83 N. E. Rep. 809.

68. **Equity**—Clean Hands.—The doctrine of clean hands held not to prevent one, who joined in a fraudulent deed of her husband's land maintaining suit to establish dower right in the lands against the husband's creditors on the deed being set aside.—*Huntzicker v. Crocker, Wis.*, 115 N. W. Rep. 340.

69. **Evidence**—Chattel Mortgages.—Where a chattel mortgage offered in evidence was inadmissible to show notice because it was improperly recorded, exclusion of a certificate of the register of deeds as to the filing of the mortgage was proper.—*Pease v. Magill, N. D.*, 115 N. W. Rep. 260.

70.—Maintaining Liquor Nuisance.—The records of a local railway station, containing receipts signed by defendant and by his agent, and description of outgoing freight, held competent evidence to show defendant to be conducting the business of dealing in intoxicating liquors or beer.—*State v. Dahlquist, N. D.*, 115 N. W. Rep. 81.

71.—Parol to Contradict Written Instrument.—A third person, claiming immunity from a debt to a firm under an oral agreement contemporaneous with a written contract of dissolution between the partners, held concluded by the written contract.—*Haag v. Burns, S. D.*, 115 N. W. Rep. 104.

72. **Executors and Administrators**—Equitable Action.—In an equitable action for discovery of property alleged to be withheld from an estate, held, that the adjudication should not be limited to determining the amount defendants had obtained from the estate, but should be a final settlement of the controversy.—*Elsentraut v. Cornelius, Wis.*, 115 N. W. Rep. 142.

73. **Exemptions**—Garnishment.—Defendant in

a garnishee action cannot dispose of his property between the service of summons and of the answer, and claim that the property in the hands of the garnishee is exempt when the answer is filed.—*Mahon v. Fansett, N. D.*, 115 N. W. Rep. 79.

74. **False Pretenses**—Question for Jury.—Whether representation of value is expression of opinion or a statement of an existing fact intended to be an inducement to the other party and which the speaker knows to be false is for the jury.—*Williams v. State, Ohio*, 83 N. E. Rep. 802.

75. **Fire Insurance**—Fraudulent Representations.—The payment of a loss by an insurance company is not a waiver of a forfeiture of the policy, where the payment was procured by fraudulent representations by insured.—*Palatine Ins. Co. of London v. Kehoe, Mass.*, 83 N. E. Rep. 866.

76.—Iron Safe Clause.—It is a sufficient compliance with the iron safe clause if from the books, with the assistance of those who understand their system, the amount of purchases and sales can be ascertained, and cash transactions distinguished from those on credit.—*Aetna Ins. Co. v. Lipsitz, Ga.*, 60 S. E. Rep. 531.

77. **Frauds, Statute of**—Part Performance.—Payment of \$100 held not a sufficient part performance of an oral contract to convey certain lots and pay \$100 in consideration of defendant's being released from a guaranty to take the contract out of the statute of frauds.—*Wheeler v. Dake, Mo.*, 107 S. W. Rep. 1105.

78. **Fraudulent Conveyances**—Mortgages.—A mortgagee in a mortgage executed by a voluntary grantee in a deed from one afterward adjudicated bankrupt held to take a good title, though the title of the mortgagor was void as against the creditors of the bankrupt.—*Putnam v. Southworth, Mass.*, 83 N. E. Rep. 887.

79. **Guaranty**—Laches.—Where a guaranty is absolute, the guarantor's liability is as broad as that of a surety, and, if conditional, a failure to give notice of the principal's default will not discharge the guarantor, unless he is prejudiced by the laches.—*Van Buren County v. American Surety Co., Iowa*, 115 N. W. Rep. 24.

80.—Remedy Against Guarantor.—The holder of a note, the collection of which defendant guaranteed, could sue at once on the guaranty if suit against the principal debtor would have been ineffective.—*Wheeler v. Dake, Mo.*, 107 S. W. Rep. 1105.

81. **Husband and Wife**—Savings Bank Deposits.—Where a husband opens a savings bank account in the names of himself and wife, the wife held to acquire a right of survivorship in the fund.—*West v. McCullough*, 108 N. Y. Supp. 493.

82. **Indians**—Police Power.—It is within the police power of the state to make it an offense to sell liquor to any person of Indian descent, though he is a citizen of the United States and of the state.—*People v. Gebhard, Mich.*, 115 N. W. Rep. 54.

83. **Injunction**—Sufficiency of Decree.—A decree restraining the manufacturer and seller of salt from violation of the anti-trust laws, without specifying what acts would constitute such violation, held insufficient.—*Lone Star Salt Co. v. Blount, Tex.*, 107 S. W. Rep. 1163.

84. **Insane Persons**—Deeds.—A deed made by a person of unsound mind before office found, the grantee having had no knowledge of such grantor's mental incapacity, and having dealt fairly with him, is voidable only, and the gran-

tee must be put in statu quo before the deed may be avoided.—*Studabaker v. Paylor, Ind.*, 83 N. E. Rep. 747.

85. **Judges—Liability on Official Bond.**—Where a county judge receives personal property belonging to an estate before the appointment of an administrator, his act is not done by virtue of his office, and the sureties on his official bond are not liable if he subsequently converts the property.—*Stephens v. Hendee, Neb.*, 115 N. W. Rep. 283.

86. **Justices of the Peace—Appeal.**—In an action begun before a magistrate, the act of the circuit court, after affirming a judgment of the magistrate for plaintiff and dismissing appeal, in ordering the record returned to the magistrate for further proceedings necessary to effectuate the judgment, was within the discretion of the court.—*Wilson & James v. Atlantic Coast Line R. Co., S. C.*, 60 S. E. Rep. 663.

87. **Landlord and Tenant—Use of Premises.**—Ordinary reasonable use and wear of goods by a tenant means the ordinary depreciation in condition of buildings or property during his occupation in the ordinary way.—*Taylor v. Campbell, 108 N. Y. Supp.* 399.

88. **Larceny—Accessories.**—One who advises another to commit larceny, but who is several miles distant at the time of the offense, but assists in the disposal of the proceeds after the theft, held an accessory.—*Skidmore v. State, Neb.*, 115 N. W. Rep. 288.

89. **Life Insurance—Beneficiaries.**—Under life insurance policy providing that the insurance should be payable to the heirs at law of the insured, if he should outlive his wife, held, on her death, the interest in the policy passed to her son, and on his death to the heirs at law of the insured.—*Birge v. Franklin, Minn.*, 115 N. W. Rep. 278.

90. **Paid Up Insurance.**—Five years held a reasonable time within which to demand paid-up insurance under a policy providing that, in case of a lapse, insured must make the demand within six months.—*United States Life Ins. Co. of New York v. Wood, Ky.*, 107 S. W. Rep. 1193.

91. **Trusts.**—A life beneficiary of a trust, who comes into possession of part of the trust property, will be presumed to have received it for trust purposes, and for the ultimate benefit of the remaindermen.—*Putnam v. Lincoln Safe Deposit Co., N. Y.*, 83 N. E. Rep. 789.

92. **Limitation of Actions—Protection of Interest by Life Tenant.**—Payments of interest on a mortgage by a life tenant of the mortgaged property held to postpone the running of the statute of limitations against the life tenant's right to foreclose the mortgage on paying the same as against the remaindermen.—*Bonhoff v. Wiehorst, 108 N. Y. Supp.* 437.

93. **Who May Question.**—Where, on foreclosure, the mortgagee offers to pay the amount due the holder of a tax sale certificate who was a party to the action, such purchaser may not plead limitations against the mortgage.—*Neill v. Burke, Neb.*, 115 N. W. Rep. 321.

94. **Mandamus—Inspection of Books.**—Mandamus will not issue to compel the officers of a joint stock company to permit an examination of the books and records by shareholders where the application was made without allowing the officers a reasonable time to act on the shareholders' demand for such inspection.—*In re Hatt, 108 N. Y. Supp.* 469.

95. **Inspection of Corporate Books.**—Mandamus is the proper remedy to enforce a stock-

holder's right to inspect the corporate books.—*State v. Donnell Mfg. Co., Mo.*, 107 S. W. Rep. 1112.

96. **Master and Servant—Assumption of Risk.**—A servant may rely on the assumption that the master will do his duty in furnishing appliances, and not merely that the master will endeavor to do his duty.—*Southern Pac. Co. v. Godfrey, Tex.*, 107 S. W. Rep. 1135.

97. **Contributory Negligence.**—In an action to recover for injuries to a servant, whether defendants were guilty of negligence in furnishing an improper appliance, and whether plaintiff's intestate was guilty of contributory negligence, were questions for the jury.—*Martin v. Gould, Minn.*, 115 N. W. Rep. 276.

98. **Duty to Warn Employee.**—A master employing an adult servant held entitled to presume that he is competent, and that he appreciates the dangers ordinarily incident to the work.—*Hardy v. Chicago, R. I. & P. Ry. Co., Iowa*, 115 N. W. Rep. 8.

99. **Fellow Servants.**—An architectural draughtsman and an elevator operator employed by the same company held fellow servants as affecting liability for injury to the draughtsman caused by the operator's negligence.—*Fouquet v. New York Cent. & H. R. R. Co.*, 108 N. Y. Supp. 525.

100. **Injuries to Servant.**—Where a servant of a railway company was killed by reason of the condition of the track, held that the company was liable, although such conditions had been caused by an independent contractor.—*Southern Ry. Co. v. Newton's Adm'r., Va.*, 60 S. E. Rep. 625.

101. **Negligence.**—The court will assume until the contrary is shown that the moving by an engineer of cars on a brakeman without signal while he is discharging his duty is a breach of the engineer's duty.—*Longhenry v. Mineral Point & N. Ry. Co., Wis.*, 115 N. W. Rep. 335.

102. **Negligence.**—That the brand of fuse used by a mining company is in general use is not conclusive evidence that the company is not guilty of negligence in furnishing it, nor is the fact that a better kind of fuse has come into common use conclusive evidence of negligence in using the older kind.—*Wilita v. Interstate Iron Co., Minn.*, 115 N. W. Rep. 169.

103. **Wrongful Discharge.**—In an action by an employee discharged from his employment for the contract price of his services, the employer has the burden of proving a sufficient cause for the discharge.—*Hinchman v. Matheson Motor Car Co., Mich.*, 115 N. W. Rep. 48.

104. **Mechanics' Liens—Priorities.**—A building erected by a tenant cannot be subjected to a mechanics' lien for materials as against a subsequent purchaser for valuable consideration, without notice of the lien or of the tenant's claim to the building.—*Denison Lumber Co. v. Milburn, Tex.*, 107 S. W. Rep. 1161.

105. **Mines and Minerals—Cancellation of Lease.**—Equity will not cancel a mining lease before expiration of the term for delay in paying rent and failure to commence operations, where lessees are ready and willing to pay the rent and perform the covenant.—*Pheasant v. Hanna, W. Va.*, 60 S. E. Rep. 618.

106. **Mortgages—Absolute Deed as Security.**—Where a conveyance of land is made as security for a loan, although there is no personal obligation to repay, the mortgagee looking solely to the instrument, it will be deemed a mortgage if intended as security.—*Conover v. Palmer, 108 N. Y. Supp.* 480.

107.—**Payment by Third Parties.**—An agreement between a first and second mortgagee held to keep separate the second mortgage interest and the interest of the purchaser of the land who also purchased the mortgage.—*Behrendt v. Chicago, M. & St. P. Ry. Co.*, Wis., 115 N. W. Rep. 146.

108. **Municipal Corporations.**—Delegation of Legislative Powers.—The right to delegate power by municipalities is subject to the rule governing a delegation of power by the legislature, and a municipality may confer an authority as to the execution of an ordinance, to be exercised under and in pursuance of an ordinance.—*People v. Grand Trunk Western Ry. Co.*, Ill., 83 N. E. Rep. 839.

109.—**Judicial Interference.**—A court of equity has no right to reform an ordinance or declare it invalid on the ground of mutual mistake.—*People v. Grand Trunk Western Ry. Co.*, Ill., 83 N. E. Rep. 839.

110. **Negligence.**—Contributory Negligence.—Where plaintiff's injuries resulted from an elevator door being left open in an unlighted hall where people were expected to go to enter offices on either side of the hall, the question of contributory negligence is for the jury.—*Baker v. Best*, Ky., 107 S. W. Rep. 1192.

111.—**Personal Injury.**—Where plaintiff was injured by the negligence of defendant and his leg was broken, and while on crutches he slipped and broke his leg again in the same place, the second breaking was not an independent injury, for which the master was not liable.—*Hyvonen v. Hector Iron Co.*, Minn., 115 N. W. Rep. 167.

112.—**Pleading.**—A petition to recover for personal injuries resulting from alleged negligence of defendant is insufficient if it fails to allege plaintiff's freedom from contributory negligence.—*Cahill v. Illinois Cent. R. Co.*, Iowa, 115 N. W. Rep. 216.

113. **Nuisance.**—Comparative Injury.—Whether the court may apply the doctrine of comparative injury cannot be considered on appeal from an order overruling a demurrer to the complaint in an action to abate a nuisance.—*Holman v. Mineral Point Zinc Co.*, Wis., 115 N. W. Rep. 327.

114. **Partition.**—Sufficiency of Petition.—Where the petition for partition alleges that the surviving spouse abandoned his homestead rights by conveying his interest therein and giving possession, it is error to sustain a general demurrer and dismiss the case.—*Ord v. Waller*, Tex., 107 S. W. Rep. 1166.

115. **Pleading.**—Practice.—The proper practice to join an issue under a plea to an information in the nature of a quo warranto, concluding with a traverse under the absque hoc of the matter alleged in the plea, stated.—*People v. Central Union Telephone Co.*, Ill., 83 N. E. Rep. 829.

116. **Principal and Agent.**—Estoppel.—A county held not charged with notice of a bridge contractor's substitution of lighter material for those contracted for, because of the knowledge of the county's engineer, who had been corrupted by the contractor.—*Van Buren County v. American Surety Co.*, Iowa, 115 N. W. Rep. 24.

117.—**Failure to Present Check.**—Where the payee of a check negotiates the same to his own agent, the failure of such agent to present the check within a reasonable time, and until after the failure of the bank, is the payee's own neglect.—*Gordon v. Levine*, Mass., 83 N. E. Rep. 861.

118.—**Misuse of Principal's Money.**—To make one liable by having participated in misuse of money of principal by an agent, it is necessary to show that he was aware that the money belonged to the principal and that the debt paid by it was a private debt of the agent.—*Perry v. Oerman & Blaebaum*, W. Va., 60 S. E. Rep. 604.

119.—**Set-Off.**—In an action for the price of certain railway tickets, bought from defendant's agent, held that defendant was not entitled to credit for a sum which plaintiff owed its agent on another transaction.—*Albright v. Atchison, T. & S. F. Ry. Co.*, Iowa, 115 N. W. Rep. 219.

120.—**Undisclosed Agency.**—Where defendants, on the order of M., purchased and paid for certain stock and procured its transfer to plaintiff's name, the mere fact of M.'s directing defendants to send on the certificate in plaintiff's name held not to disclose plaintiff as M.'s principal.—*Burnham v. Eyre*, 108 N. Y. Supp. 452.

121. **Principal and Surety.**—Limitation of Action.—In an action on a firm note against a surety thereon partially paid on bankruptcy of the surviving partner, that the firm assets of the bankrupt and his individual assets were not separated, and the claims of the different classes of creditors properly assigned to the different assets, held no defense.—*Akin v. Van Wirt*, 108 N. Y. Supp. 327.

122. **Public Lands.**—Statutes.—When the legislature has the power to enact a given law and the act clearly expresses its legal intent, the courts should construe it so as to effectuate its terms.—*State v. Rat Portage Lumber Co.*, Minn., 115 N. W. Rep. 162.

123. **Railroads.**—Authority of Superintendent.—In an action by a railroad company, held that the question whether plaintiff's superintendent was authorized to write a letter offered in evidence, as to the boundary of plaintiff's right of way, should have been submitted to the jury.—*Southern Ry., Carolina Division, v. Howell*, S. C., 60 S. E. Rep. 677.

124.—**Duty to Look and Listen.**—A person crossing a railroad track is not obliged to look, where the sight is so obscured as to afford him no intelligence, nor to listen, if conditions are such that there can be no hearing.—*Allen v. Boston & M. R. R.*, Mass., 83 N. E. Rep. 863.

125.—**Injury to Person on Track.**—A traveler approaching a point where it will be necessary to cross a railroad track laid in a public street has a right to anticipate that the train will be operated according to law and without negligence.—*Schwanenfeldt v. Chicago, B. & Q. Ry. Co.*, Neb., 115 N. W. Rep. 285.

126. **Rape.**—Instructions.—A charge on a trial for rape though not specifically stating that the force must have been sufficient to overcome the resistance of the woman, held necessarily to imply it.—*State v. Zempel*, Minn., 115 N. W. Rep. 275.

127. **Reformation of Instruments.**—Bona Fide Purchasers.—Where an owner of two lots is deceived by a third person into believing that his deed conveys but one lot, and the purchaser is without knowledge of the deception, before the owner is entitled to any relief he must return the consideration.—*Horwitz v. La Roche*, Tex., 107 S. W. Rep. 1148.

128. **Release.**—Sufficiency.—In an action to recover for injuries received while a passenger on defendant's street railway, the defense being a release of liability for such injuries, a

statement by defendant's agent held not a misrepresentation of fact.—*McNamara v. Boston Elevated Ry. Co.*, Mass., 83 N. E. Rep. 878.

129. **Robbery**—Instruction as to Evidence.—Where defendant was arrested twenty days after the robbery, and a package of money was found on his person, held that the failure to charge that such possession was not so recent as to constitute a circumstance against defendant was not error.—*Tabor v. State*, Tex., 107 S. W. Rep. 1116.

130. **Sales**—Breach of Warranty.—In an action to recover on a note for the price of a machine, evidence held to show breach of warranty, and that within the time prescribed by the contract the purchaser served notice of such fact on the seller.—*Northwest Thresher Co. v. Hulburt*, Minn., 115 N. W. Rep. 159.

131.—**Damages**.—That an objection to the quality of an article purchased does not survive an acceptance by the buyer does not prevent the buyer from proving that the property was unsatisfactory to show a breach of contract by the seller.—*Lahmaler v. Standard Specialty & Tube Co.*, 108 N. Y. Supp. 402.

132.—**Mutuality of Contract**.—Where a person buys stock in a company upon an agreement of another to take it off his hands after six months at par, the agreement is not invalid for want of mutuality.—*Moench v. How-er*, Iowa, 115 N. W. Rep. 229.

133. **Schools and School Districts**—Tuition Fees.—Where a high school district was entitled to recover tuition for instruction furnished to non-residents, an action therefor could not be maintained in the name of the board of education of the city containing such high school district.—*City of Columbus v. Town of Fountain Prairie*, Wis., 115 N. W. Rep. 111.

134. **Street Railroads**—*Res Ipsa Loquitur*.—In an action by a passenger against a street railway company for injuries sustained from the overturning of a car, instructions ignoring the doctrine of *res ipsa loquitur* held properly refused.—*Minihan v. Boston Elevated Ry. Co.*, Mass., 83 N. E. Rep. 871.

135. **Sunday**—Check Delivered on Sunday.—Where a creditor accepted a check on Sunday and negotiated the same on Monday, receiving the face value, the result was the same as if he had received the money from the bank.—*Gordon v. Levine*, Mass., 83 N. E. Rep. 861.

136. **Taxation**—Property of Non-Residents.—Ancillary executors cannot be compelled, for the purpose of increasing the amount of property within the jurisdictional subject to collateral tax, to bring proceeds of personal property from the place of domiciliary administration to pay off a mortgage on land.—*McCurdy v. McCurdy*, Mass., 83 N. E. Rep. 881.

137.—**Real Estate Tax**.—An illegal tax on realty may be paid under duress of personalty in case of seizure to enforce the tax or paid under protest to prevent seizure to remove the cloud on the title of property.—*A. H. Stange Co. v. City of Merrill*, Wis., 115 N. W. Rep. 115.

138. **Telegraphs and Telephones**—Damages for Mental Anguish.—Where the delivery of a message is negligently delayed by a telegraph company, the sender is entitled to a reasonable compensation for mental and physical anguish suffered by her as the direct and proximate result of the delay, but not for mere disappointment or regret.—*Gerock v. Western Union Telegraph Co.*, N. C., 60 S. E. Rep. 637.

139.—**Failure to Deliver Message**.—Under

the facts, held there was a right to recover for negligent delay in sending and delivering a telegram.—*Western Union Telegraph Co. v. Hanley*, Ark., 107 S. W. Rep. 1168.

140. **Tender**—Payment Into Court.—A plaintiff whose claim is extinguished by a jury's finding in favor of the defendant on a counterclaim is not entitled to a judgment on defendant's tender, but defendant is entitled to a return of the money.—*Ahrens v. Fenton*, Iowa, 115 N. W. Rep. 233.

141. **Trial**—Burden of Proof.—The general rule relative to burden of proof being correctly stated in the charge, error held not to have been committed in declining to adopt the words suggested by requested charges or to illustrate the rule by reference to specific classes or items of evidence.—*Salchert v. Reinig*, Wis., 115 N. W. Rep. 132.

142.—**Credibility of Witness**.—In an action for personal injuries, where there is testimony warranting a finding for plaintiff, the question of the credibility of plaintiff as a witness is for the jury.—*Louisville Bridge Co. v. Allen*, Ky., 107 S. W. Rep. 1191.

143.—**Question for Jury**.—Where the existence of a state of facts is undisputed, but different minds might honestly draw different conclusions as to whether such facts established negligence, the question is for the jury.—*Schwanenfeldt v. Chicago, B. & Q. Ry. Co.*, Neb., 115 N. W. Rep. 285.

144. **Trusts**—Tracing Trust Funds.—Where moneys belonging to a cestui que trust are mingled with funds of the trustee, it will be presumed that he has paid out his own money so long as the fund is large enough to contain all the moneys of the cestui que trust and some of those of the trustee.—*Emigh v. Earling*, Wis., 115 N. W. Rep. 128.

145. **Vendor and Purchaser**—Certainty of Contract.—Where a contract is for the sale of thirty acres of land to be selected by the grantee from a larger tract specifically described, the contract is sufficiently definite.—*Schuyler v. Wheelon*, N. D., 115 N. W. Rep. 259.

146.—**Notice**.—Possession of land as tenant is not notice to a purchaser of the land of the tenant's claim of title to a building.—*Denison Lumber Co. v. Milburn*, Tex., 107 S. W. Rep. 1161.

147. **Waters and Water Courses**—Damages for Diminishing Flow.—One diminishing the flow of the water in a stream supplying power to operate a mill held liable for the damages occasioned to the owner, resulting from the diminished value of the use of the mill.—*King v. Board of Council of City of Danville*, Ky., 107 S. W. Rep. 1189.

148. **Wills**—**Equitable Estates**.—A vested equitable estate in a remainder descends, on the death of the cestui que trust prior to the termination of the life estate, to the children and widow of the beneficiary, in the absence of a will.—*Williams v. Williams*, Wis., 115 N. W. Rep. 342.

149.—**Probate**.—A decree of the surrogate refusing probate to a will of realty is not conclusive evidence of its validity in a subsequent action in the supreme court between the same parties.—*In re Goldsticker's Will*, 108 N. Y. Supp. 480.

150.—**Undue Influence**.—Undue influence, advice or solicitation held insufficient to invalidate a will, unless exercised at the time the will was executed so as to make it the result of such influence.—*Gates v. Cole*, Iowa, 115 N. W. Rep. 236.